IN THE

Supreme Court of the United States

No. 521

MARGARET E. SMITH
and
RUTH SCHUCHMAN,

Petitioners,

vs.

STATE OF MARYLAND,

Respondent.

BRIEF OF THE STATE OF MARYLAND IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It may be found, however, in 65 A. 2d (Adv. Shts.) 287 (1948); and a certified copy thereof is appended to the transcript of record filed in this Court.

JURISDICTION

The judgment of the Court of Appeals of Maryland sought to be reviewed was entered on November 10, 1948. The petition for a writ of certiorari was filed on January 25, 1949.

The jurisdiction of this Court is sought to be invoked under Section 1257(3) and Section 2106 of Revised Title 28, United States Code Annotated. It should be noted that Section 2106 of Title 28 relates only to the authority of this

Court in the determination of any judgment, decree or order of a court "lawfully brought before it for review". Jurisdiction, if any, must, therefore, exist under Section 1257(3) of Revised Title 28.

The Petitioners state that, in their motion to quash the search warrant and to suppress the evidence obtained thereunder, which was filed in advance of the trial of the case, they alleged that there had been a denial of their rights under the Constitution of the United States. In that motion, the Petitioners alleged only that their rights under the Fourth Amendment to the Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States were violated. In the Court of Appeals of Maryland, as appears from the Petitioners' briefs filed in that Court, the contention was made that the Petitioners' rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated. No mention was made of the Fourteenth Amendment to the Constitution of the United States nor was any contention based thereon. *In this Court, for the first time, the Petitioners contend that the rights guaranteed to them under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States were violated.*

QUESTIONS PRESENTED

The Petitioners contend: (1) that the showing of probable cause to believe that a crime was being committed was insufficient to authorize and justify the issuance of a search warrant, (2) that the search warrant was a general search warrant, (3) that the search warrant did not authorize a search of a rented room in the described premises, (4) that the Petitioners were deprived of "fundamental rights" guaranteed to them by the Fourteenth Amendment to the Con-

stitution of the United States, and (5) that the guarantees under the Maryland Declaration of Rights alleged to have been denied, being in *pari materia* with the guarantees under the Fourth and Fifth Amendments to the Constitution of the United States, cannot be abrogated by the State of Maryland.

The Respondent contends that none of the contentions made by the Petitioners raises any Federal questions, and that, under the undisputed facts in the case, the evidence upon which the Petitioners were convicted was not obtained under the warrant about which they complain. Therefore, the following questions are presented:

I.

Have the Petitioners Shown the Violation of any Federal Rights?

II.

Do the Undisputed Facts Show that the Evidence upon which the Petitioners were Convicted was Obtained under the Search Warrant which they Attack?

STATEMENT OF FACTS

Nowhere in the petition for certiorari or in the brief in support of that petition are the facts in the case at bar set forth. The record discloses that the following took place:

The Petitioners, together with a third Defendant, were indicted for unlawfully making and selling books or pools on horseraces and for keeping a house for the purpose of betting and gambling in violation of the laws of the State of Maryland. They waived a jury trial and were tried upon their pleas of not guilty. They were convicted and sentenced to pay a fine of $1,000 each and costs, while the third Defendant was found not guilty and discharged.

Prior to the trial of the Petitioners' case in the Criminal Court of Baltimore, the Petitioners filed a motion to quash the search and seizure warrant and to suppress all of the evidence and property alleged to have been obtained thereunder. No separate hearing was held on this motion. Their motion was overruled, and the Petitioners objected to the use of any of the information or property as evidence during the course of the trial. These objections were also overruled. However, the Petitioners were given an opportunity at the conclusion of the State's case to move that all of the evidence relating to the information and property alleged to have been obtained under the search warrant be stricken from the record. This motion likewise was overruled.

At the Petitioners' trial it was shown that on January 13, 1947, about 4:00 o'clock in the afternoon, Captain Alexander L. Emerson, of the Baltimore City Police Department, with other members of his force, in execution of a search warrant theretofore obtained from an Associate Judge of the Supreme Bench of Baltimore, entered the premises at 430 East 20th Street, Baltimore, Maryland. In accordance with the procedure set forth in Section 306 of Article 27 of the Annotated Code of Maryland (1939 Edition), the warrant had been obtained on the affidavit of probable cause of Captain Emerson of the Department of Police of Baltimore City upon the observations of Officer Gerald Dolan.

The affidavit set forth, in substance, that Officer Dolan had watched the premises at 430 East 20th Street, Baltimore, Maryland, on July 9 to July 12, 1948, inclusive, and that on these four days, with the exception of July 11, 1948, which was Sunday, the officer observed, between the hours of 12:00 o'clock noon and 1:00 P. M. a white man described as forty-two years of age, about five feet nine inches tall,

weighing about one hundred sixty-five pounds and carrying an Armstrong scratch sheet and a Daily Racing Form walk east on 20th Street, and upon reaching the said premises hesitate momentarily and act suspiciously by looking about as if to ascertain if he were being watched and followed, and then enter the premises. Between the hours of 5:00 P. M. and 6:00 P. M. on the aforesaid days, except Sunday, the Officer saw the said described man come out of the premises and hurriedly walk from the vicinity. The affidavit also set forth that the time at which the said described man entered the premises was prior to the post time of the first horserace and that the time at which he left the premises was a time when most bet taking activities conducted over the telephone had been concluded for the day. It was also alleged that the papers carried by the said described man are daily horserace publications generally used by bookmakers in the unlawful operation of bookmaking.

It was also set forth in the affidavit that the premises at 430 East 20th Street, Baltimore, Maryland, a three story brick dwelling house, were indicated in the October, 1947, issue of the Baltimore Telephone Directory as being equipped with a telephone—Hopkins 4453—listed to Kenneth W. Hughes, on the second floor. Officer Dolan, on January 12, 1948, at about 2:30 P. M., that is, a time after the said described man had entered the premises at 430 East 20th Street, called telephone number Hopkins 4453 and the telephone was almost immediately answered by a male voice which said "Hello". The Officer said: "This is Bill, give me five to win on Mumbo Jumbo in the 7th at Gulf Stream" and the said male voice replied "O.K., Bill, is that all?". The Officer answered "Yes", and the said telephone conversation was completed. It was further alleged in the affidavit that Mumbo Jumbo was the name of a horse

entered to run in the seventh race at Gulf Stream Park Race Track on the said date and in horserace parlance "five to win" means that five dollars is bet on the said horse.

Upon this affidavit, a Search and Seizure Warrant was issued by the Hon. Edwin T. Dickerson, Associate Judge of the Supreme Bench of Baltimore City, to Captain Emerson commanding him, with the necessary and proper assistance, to enter into the said premises at 430 East 20th Street and there diligently to search the said premises and all persons found on the said premises for rundown sheets, betting slips, etc., and all other paraphernalia used in the unlawful operation of gambling on races, and also the body of the said white man described as being about forty-two years of age, about five feet nine inches tall, weighing about one hundred sixty-five pounds and all other persons who may be found on the said premises who may be participating in bookmaking activities.

Accordingly, Captain Emerson, with other members of his force, executed the aforesaid search warrant by entering the premises at 430 East 20th Street, Baltimore, Maryland. In the execution thereof, Captain Emerson found the Petitioner, Margaret E. Smith, engaged in placing bets on horses contrary to law. No search was made of the person of the Petitioner, Margaret E. Smith, but the various paraphernalia used by her was seized. The Petitioner, Ruth Schuchman, was also found engaged in taking bets on horses contrary to law. No search was made of her person; but upon the request of Captain Emerson, she voluntarily emptied her pocketbook and gave him the contents thereof. The various racing paraphernalia on the telephone stand where the Petitioner, Ruth Schuchman, was working was also seized and used as evidence.

ARGUMENT

I.

THE PETITIONERS HAVE NOT SHOWN THE VIOLATION OF ANY FEDERAL RIGHTS.

The Petitioners contend that the search and seizure warrant violated their rights under the Fourth, Fifth and due process clause of the Fourteenth Amendments to the Constitution of the United States because: (1) the affidavit of probable cause upon which it was issued was made on information and belief of the affiant and did not show probable cause, and (2) the warrant was a general warrant in that it failed to describe the persons or premises to be searched with the necessary particularity.

Needless to say, the decision of the Court of Appeals of Maryland established, as a matter of State law, both statutory and constitutional, that this particular search warrant was issued upon an affidavit which did show probable cause. The Court also reaffirmed its prior decision in *Allen v. State*, 178 Md. 269 (1940), that the affidavit is sufficient if made on information and belief where the facts and sources of information on which belief is based are stated.

The decision further established that, as a matter of State constitutional law, the warrant was not a general warrant within the prohibitions against such warrants contained in the Maryland Declaration of Rights.

Further than this, this Court need not look because the Petitioners claim that rights protected by the Fourth, Fifth and Due Process Clause of the Fourteenth Amendments to the Constitution of the United States were denied them are answered by the well settled doctrines that the Fourth and Fifth Amendments to the Constitution of the United States have no application to the States and the conduct of

State officials acting under State law, and that such amendments were not made applicable to the States and State officials by the adoption of the Fourteenth Amendment. *Twining v. New Jersey,* 211 U. S. 78 (1908); *Weeks v. United States,* 232 U. S. 383 (1914); *Palko v. Connecticut,* 302 U. S. 319 (1937); *Feldman v. U. S. Oil & Refinery Co.,* 322 U. S. 487 (1943); *Adamson v. California,* 332 U. S. 46 (1947).

Twining v. New Jersey, supra, reaffirmed prior decisions beginning with *Barron v. Baltimore,* 7 Pet. 243, that the first ten Amendments, in themselves, are not operative on the States. It also held that the privilege against self incrimination guaranteed by the Fifth Amendment was not operative on the States and included within the scope of the protection of the due process clause of the Fourteenth Amendment.

Weeks v. United States, supra, dealt specifically with the contentions which the Petitioners make here. There, the Defendant was arrested by State police officers without a warrant at a railroad station in Kansas City, Missouri. At the same time, other State policemen went to the Defendant's home, searched it and took possession of various papers and articles found, all of which were used as evidence against the Defendant in a prosecution in a Federal Court for illegal use of the mails. The Defendant claimed that the evidence thus obtained could not be used against him since it was obtained in violation of the Fourth Amendment. In disposing of the contention, this Court said:

> "* * * What remedies the Defendant may have against them (State police officers) we need not inquire as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. * * *"

Twenty-three years later, in *Palko v. Connecticut, supra,* in holding that a conviction in a State court of murder in the first degree on a second trial of a criminal prosecution after a conviction of murder in the second degree had been set aside on an appeal taken by the State is not prohibited by the Fifth Amendment nor the Due Process Clause of the Fourteenth Amendment, this Court specifically pointed out that the Fourteenth Amendment does not make the Fourth Amendment applicable to the States or State officials acting under State law.

In *Feldman v. United States, supra,* it was held that the admission in a Federal Court of testimony previously given by him in civil proceedings in a State court does not deprive him of the protection of the Fifth Amendment. This Court pointed out that the first ten Amendments to the Constitution of the United States by their terms protect an individual only against invasion of civil liberties by the Federal Government whose conduct they alone limit. It was there pointed out that, even in a prosecution in a Federal Court, evidence secured through unreasonable search and seizure by State officials without participation by Federal officials is admissible in evidence, and its use is not prohibited by the Fourth and Fifth Amendments.

In *Adamson v. California, supra,* the applicability of the first ten Amendments to the Constitution as protection against State action was reconsidered. There, it was pointed out that those Amendments were adopted for the protection of rights of national citizenship. While those provisions protect an individual from Federal action, they are inapplicable to similar actions done by the States. The effect of the adoption of the Fourteenth Amendment was not to guarantee as such all Federal privileges or immunities protected by the Bill of Rights. In discussing this construction of the Fourteenth Amendment, the Court said:

"* * * As a matter of words, this leaves a state free to abridge, within the limits of the due process clause, the privileges and immunities flowing from state citizenship. This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship. It is the construction placed upon the amendment by justices whose own experience had given them contemporaneous knowledge of the purposes that led to the adoption of the Fourteenth Amendment. This construction has become embedded in our federal system as a functioning element in preserving the balance between national and state power. We reaffirm the conclusion of the Twining and Palko Cases that protection against self-incrimination is not a privilege or immunity of national citizenship." (Footnotes eliminated.)

Specifically, the *Adamson* case held that neither the Fifth Amendment nor the due process clause were violated by the California rule which permits the disclosure of a former conviction to the jury to impeach the testimony of an accused who elects to testify, and further permits comment to be made to the jury upon an accused's failure to testify.

In the latest case involving the scope of the protection afforded by the Fourth Amendment, that of *McDonald v. United States,* ..... U. S. ....., (No. 36, October Term, 1948, decided December 13, 1948), the Court pointed out that the Fourth Amendment is a guarantee of protection against unreasonable search and seizure and extends to the innocent and guilty alike. And, the law provides as a sanction

against the flouting of this constitutional safeguard the suppression of evidence secured as a result of the violation *when such evidence is tendered in a Federal Court.*

These authorities demonstrate that the Petitioners' contentions are without merit. The Fourth and Fifth Amendments to the Constitution of the United States have no application to the actions of the police of the City of Baltimore in obtaining evidence upon which the Petitioners were convicted in a State court of a violation of State law relating to the making of pools or books on horseraces; nor are the Fourth and Fifth Amendments made directly applicable to such a situation by operation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Similarly, the protection of the Fourth and Fifth Amendments claimed here is not included among those fundamental rights protected by the Due Process Clause.

The Petitioners' contentions that they were denied due process of law because of an erroneous construction of State constitutional law and prior decisions by the Court of Appeals of Maryland is without merit, for as stated in *Buchalter v. New York*, 319 U. S. 427 (1943):

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'. Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. *But the Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and common law doc-*

tries as they deem appropriate; and does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court." (Italics supplied, footnotes eliminated.)

II.

THE UNDISPUTED FACTS SHOW THAT THE EVIDENCE UPON WHICH THE PETITIONERS WERE CONVICTED WAS OBTAINED AS AN INCIDENT OF THEIR VALID ARREST.

The undisputed facts of record show that there was no search made under the warrant attacked here. The facts are that both Petitioners were found by the police actively engaged in a violation of the laws prohibiting the making and selling of books or pools on horseraces. Moreover, no search was made of the person of the Petitioner, Margaret E. Smith. The only search made of the Petitioner, Ruth Schuchman, was the search of her pocketbook made with her consent. Seizure of the racing paraphernalia was made not under the search warrant, but as an incident to the valid arrest of both Petitioners for crimes committed in the presence of the police.

It is submitted that, even if the guarantees of the Fourth, Fifth and Fourteenth Amendments have application to this case, the result is governed by *Harris v. United States,* 331 U. S. 145 (1947). Cf. *Johnson v. United States,* 333 U. S. 10 (1947); *Trupiano v. United States,* 334 U. S. 699 (1948); *McDonald v. United States,* ..... U. S. ..... (No. 36, October Term, 1948, decided December 13, 1948). It is recognized that the authority of the *Harris* case has application only to exceptional circumstances, but the facts of the case at bar bring it within its scope. Unlike the *Trupiano* case, there is no evidence that the existence of the racing paraphernalia was known to the police prior to the Petitioners' arrest. Unlike the *Johnson* and *McDonald* cases, the crime was committed in the actual presence of the police officers.

It is submitted that use of the evidence seized was permissible aside from the validity of the warrant because such evidence was validly obtained as an incident of valid arrest.

CONCLUSION

The writ of certiorari prayed for in the instant case should not issue because the Petitioners have not shown that any Federal right was denied them. Moreover, even if it be assumed that the Petitioners had a Federal right which should be afforded protection, they have not shown that the right was treated other than in accordance with the applicable decisions of this Court.

Respectfully submitted,

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